

**Part 2 Attachment B: SUPPLEMENTAL NOTICE OF INTENT TO APPEAR
CALIFORNIA WATERFIX CHANGE PETITION HEARING**

Part 2 of the Public Hearing is scheduled to commence on **January 18, 2018**

Parties identified on the second page of this form have stated their intent to present direct testimony and call witnesses in Part 2 of the above hearing. **Only** those parties are required to fill out this form. Complete forms shall be submitted to CWFhearing@waterboards.ca.gov and copied to the current Service List no later than **noon on September 22, 2017**. Failure to complete and submit this form by the deadline may be construed as intent not to present witnesses in Part 2 of the hearing.

PATRICK PORGANS/ASSOCIATES plans to participate in Part 2 of the water rights hearing.

Check the applicable box(es) below. Be sure to present direct testimony if the hearing and plan to call the following witnesses to testify.

I/we still intend to present direct testimony in Part 2 of the hearing and plan to call the following witnesses to testify:

NAME OF WITNESSES	SUBJECT OF PROPOSED TESTIMONY (Please provide a brief description of each witness proposed testimony)	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
Patrick Porgans	Water supply reliability; levee integrity; "Dual Path", impacts on public trust resources; ITP; compliance issues, and the Cross Delta Channel-ESA "Take"; CVPIA Fish Doubling.	20 Minutes per witness	YES
SEE ATTACHMENT	Most knowledgeable DWR employees and consultants regarding feasibility of "dual path" delivery system April thru July of each year at or above 3,000 CFS without established financing for Delta levee preventative maintenance, repair or funding an immediate Plan of Action (POA) in the event of levee failures. In the absence of such a POA, the Petitioners place other water users, Public Trust resources, and the economic and ecological sustainability of the Delta at an unacceptable level of risk, which is not in the public's interest. (See attached page(s).)	Number of Witnesses at no more than five (5)	YES

(If more space is required, please add additional pages.)

- I/we no longer intend to present direct testimony in Part 2 of the hearing and intend to participate by:
- a) A cross-examination and/or rebuttal ~~only~~ and may present an opening or policy statement.
- b) Presenting a policy statement only (I/we no longer intend to present evidence or participate in cross-examination and/or rebuttal)
- I/we no longer intend to participate in Part 2 of the hearing:

Fill in the following information of the Participant, Party, Attorney, or Other Representative:

Name of Authorized Representative (Print): **Patrick Porgans**
 Representative's Affiliation: **Planetary Solutionaries**
 Mailing Address: **P.O. Box 60940, Sacramento, CA 95860**
 Phone Number: **(916) 543-0780**
 Email: **planetarysolutionaries.org**

Signature _____ Date: 12 October 2017

ATTACHMENT to Supplemental Notice of Intent to Appear

Patrick Porgans/Associates

1
2 Patrick Porgans intends to question the most knowledgeable DWR, Reclamation, federal and state
3 fisheries personnel, and consultants, responsible for the findings and conclusions contained in the
4 Biological Opinion and the Incidental Take Permit (ITP).

5
6 The foundation of Patrick Porgans testimony is his 45 years of experience involving water supply
7 reliability; levee maintenance; the history of levee failures; the need for “Dual Path” conveyance
8 system; and water-right compliance. Porgans will testify to the ongoing adverse and unmitigated
9 impacts on other water right holders; the decline of ESA listed species attributable to SWP and CVP
10 operations. Lastly, P/A will provide government data, and prior agreements, to ascertain what level of
11 confidence the public should have in the DWR and Bureau regarding assurances they made during
12 the Hearing, compare to their past performance.

13
14 On behalf of Planetary Solutionaries, Porgans/Associates (P/A) supports the comments, concerns,
15 and Exhibits inclusive in Mr. Paul Minasian Supplemental Notice of Intent to Appear San Joaquin
16 River Exchange Contractors Water Authority (SJRECWA).

17
18 PA raised similar concerns during Part 1 of the Hearing. Also, P/A submitted exhibits relative to the
19 government’s concerns regarding the structural integrity of the Delta levees, and, raised similar
20 questions asked Mr. Minasian.

21
22 Over the past four decades, there have been a plethora of studies and reports conducted by the
23 Department of Water Resources (DWR), U.S. Geological Survey, CalFed, and other governmental
24 entities expressing concerns regarding the inevitable failure of the Delta levee system.

25
26 Delta Master Levees were authorized and funded back in 1960; however, DWR opted to defer
27 construction and spent the funds allocated for levees to pay for other underfinanced State Water
28 Project (SWP) facilities. P/A conducted a 10-year forensic accounting of all aspects of the SWP and
29 completed a series of 12-Fact-Finding reports, that revealed that the Project was underfinanced,
30 contractually over-committed, and was not “paying-for-itself” as promised to the people of California.

31
32 P/A Fact-Finding Reports prompted a series of Senate hearings, during the early 1990s; wherein, the
33 findings contained in P/A’s reports where affirmed, by the Senate Agricultural and Water Committee,
34 the DWR, and the SWP contractors. In fact, P/A reports resulted in the DWR to repay \$500 million it
35 owed to the State’s General Fund and the California Water Fund. P/A, in unison with clients,
36 successfully obtained \$120 million for Delta levee improvements. Those funds helped to avert
37 massive damages and levee failure during the 1997 flood.

38
39 The DWR has the mandate to provide flood protection for the Delta. Unfortunately, the records
40 indicate, it has failed to perform, placing the public’s water supply, private property, and public trust
41 resources at an unacceptable level of risk. It is for these, and many other concerns, such as those
42 enumerated in the SJRECWA NOI, that P/A wholeheartedly supports Mr. Minasian, and his client’s
43 position, interests, and requests, in their entirety.

44
45 The public has the right to have the answers to SJRECWA questions. CWF Co-Chairs can and
46 should require the DWR’s Most Knowledgeable Employees and Consultants, to subpoena and

1 present the testimony of those employees and any independent consultants, at the Hearing and give
2 answers to the questions, enumerated in SJRECWA's NOI. P/A would appreciate the opportunity to
3 question the most knowledgeable persons available to DWR regarding the issues and facts of what
4 measures and funding would be required to provide for a reasonably reliable "dual path" conveyance
5 of 3,000 cfs during July through September.
6

7 **NOTE:** P/A received permission from the Law Offices of Minasian, Meith, Soars, Sexton, & Cooper,
8 LLP to include the following information in our Supplemental NOI. The following texts are verbatim
9 quotations contained in the SJRECWA Supplemental NOI.
10

11 **ATTACHMENT to Supplemental Notice of Intent to Appear San Joaquin River Exchange**
12 **Contractors Water Authority**
13

14 1. This Supplemental Notice of Intent to Appear in Part 2 of the California WaterFix Hearing is for the
15 purposes of reminding the SWRCB that the San Joaquin River Exchange Contractors Water Authority
16 (SJRECWA) continues to request, now in Part 2 (having been denied the right in Part 1 of the
17 hearings), to take the depositions of the Department of Water Resources' Most Knowledgeable
18 Employees and Consultants, to subpoena and present the testimony of those employees and any
19 independent consultants that may be presented by the Department of Water Resources (DWR) in
20 response to the Notices as written testimony before the Board, and to provide for brief cross-
21 examination of those witnesses by the SJRECWA on direct as apparently hostile witnesses. Leave to
22 permit such evidence to be produced would provide an opportunity for all other parties to cross-
23 examine these witnesses.
24

25 Such evidence is clearly relevant to the issues in Part 1 and Part 2. Although stated in different ways
26 and contexts, the State Board in its October 27, 2016 Ruling addressed the scope of Part 2 and
27 stated:
28

29 "The key issues reserved for Part 2 of the hearing included whether the changes proposed in the
30 Petition would unreasonably affect fish, wildlife or recreational uses of water or other public trust
31 resources, and whether the proposed changes are in the public interest." (Emphasis added.)
32

33 2. Evidence regarding the feasibility and the mitigation measures reasonably required to be imposed
34 on DWR and Reclamation as a condition of granting the Change Petition in order to maintain levees
35 and channels so that the assumed July through September "Dual Path" water flows can in fact occur,
36 or if there is a levee failure, whether those failures can be remedied with a secure fund in a
37 reasonable period, is relevant. Failure of the SWRCB to consider such evidence and measures would
38 confirm that the modeling assumptions and Project Description for CEQA purposes and Change
39 Petition purposes is a "pipe dream."
40

41 3. The current state of the record of actions of the DWR, the Exchange Contractors, and the SWRCB
42 on the relevance of this evidence. A brief refreshment of the SWRCB Board Members and Staff may
43 be helpful:
44

45 3.1 Notice to Appear Served on DWR. A Notice to Appear – the State Board's equivalent of
46 a Subpoena – was served upon the DWR by SJRECWA on August 30, 2016 pursuant to Government
47 Code §11450.05 and 11450.50, and California Code of Regulations, Title 23, 649.6, requiring the
48 appearance of Mr. David Mraz and other most knowledgeable persons of DWR on discrete subjects
49 related to the financial requirements, feasibility and economic funding requirements of levee integrity

1 measures and the Delta Risk Management Studies to support a “dual path” project as modeled. (See
2 Exhibit “1” attached hereto.)
3

4 3.2 What do DWR employees know about the funding DWR and CVP would have to
5 expend to maintain a “dual path”? Will DWR and the CVP throw up their hands when levees collapse
6 or will the CVP and DWR fix them? DWR witnesses were listed to testify as to what exactly DWR and
7 CVP’s channel maintenance plan and financing plan was to be to maintain channels and levees to
8 support 3,000 cfs or more cross-Delta flow to CVP/SWP pumps as assumed in DWR Exhibit 515,
9 page 2. (Exhibit “2”.)
10

11 3.3 DWR objections overruled by SWRCB. After DWR objected to the Notice to Appear and
12 a protective order was sought, on October 7, 2016, over the objections of DWR, the SWRCB ruled
13 that the Notice to Appear was proper and DWR’s witnesses could be utilized in the place of private
14 consultants to testify regarding the conditions for a reliable “dual path” delivery. (Exhibit “3”.)
15

16 3.4 DWR refuses to follow State Board Order and objects to DWR witnesses testifying.
17 After SJRECWA outlined the questions to be asked and areas of inquiry on the eve of the
18 appearance of DWR employee Mr. Mraz as a witness in the Hearings, on October 27, 2017, DWR
19 again refused to produce Mr. Mraz or any of its other employees or consultants and filed a Request
20 for Protective Order claiming among other things that the testimony would be irrelevant. Although no
21 other DWR witness had provided direct evidence or testimony or claimed competence on what
22 measures existed to assure levee maintenance and emergency response funds to maintain a “dual
23 path” delivery system or to reconstruct such a system if it was damaged, DWR claimed the testimony
24 could have been produced through cross-examination of DWR modeling and by other witnesses.
25 (Exhibit “4”.)
26

27 3.5 SWRCB reverses its Ruling and orders that DWR need not produce the witnesses. On
28 December 8, 2016, the SWRCB reversed its ruling and barred the ability of the SJRECWA to present
29 testimony of Mr. Mraz or any other independent expert in regard to the levee maintenance, repair,
30 preventive measures and the emergency response funding and plan if there were failures which
31 would allow the “dual path” water deliveries to be reasonably possible. (Exhibit “5”.)
32

33 3.6 Motion for Reconsideration by SJRECWA never ruled upon. Astonished, on December
34 23, 2016 SJRECWA filed a motion for Reconsideration, pointing out both the substantive legal
35 requirements that required consideration of such evidence as part of due process and why DWR and
36 the CVP description of the Project described the “dual path water delivery” as a integral part of the
37 Project which requires that it be properly supported and financed to be reliable and usable. (Exhibit
38 “6”.) The Board has never ruled on the requested reconsideration.
39

40 3.7 The SWRCB requests that parties suggest briefing subjects. SJRECWA asked in its
41 briefing comments whether DWR and CVP will be permitted to abandon “dual path” because levee
42 maintenance may become too expensive? The SWRCB asked for Parties to describe the subjects
43 that should be briefed as part of the Part 1 proceedings. The Exchange Contractors responded,
44 pointing out that the subject of both the exclusion of evidence by direct order of the Board and the
45 actions of the DWR and CVP implicated that the modeling supporting the Change Petition assuming
46 a “dual path” delivery system and capability would exist and function had to be briefed and
47 considered and Part 1 should be reopened for that purpose.
48

49 The failure of DWR to actually present evidence of how levees, channels and response funding for
50 repairs would be available when levee system collapses occurred which could reinstate the “dual

1 path” system deliveries constituted a legal deficiency in meeting their burden of proof for the Change
2 Petition.

3
4 Alternatively, the Change Petition must describe that when levees fail, whether the 3,000 cfs is to be
5 transported through the Tunnels, or whether a different project is allowed because the second path
6 cannot be funded due to all funding being directed to the Tunnels. A proposed Project not describing
7 means of future operation and maintenance has significant due process and CEQA implications in
8 terms of the Project Description. (Exhibit “7”.)

9
10 No response has been received from the SWRCB to SJRECWA’s suggested briefing or authorities
11 filed January 31, 2017.

12
13 3.8 The Exchange Contractors send a March 2, 2017 Deposition Notice of DWR
14 employees. On March 2, 2017, the Exchange Contractors served a Notice of Deposition on DWR for
15 Mr. Mraz and the other most knowledgeable persons available to DWR regarding the issues and facts
16 of what measures and funding would be required to provide for a reasonably reliable “dual path”
17 conveyance of 3,000 cfs during July through September. The Notice called for witnesses with
18 knowledge of the measures DWR proposed would be in place for those levee and channel facilities
19 maintenance and repair and reconstruction when and if they were damaged by floods, earthquakes or
20 similar events; that information was gathered by DWR at taxpayer cost in the Delta Risk Management
21 Strategy studies. (Exhibit “8”.)

22
23 3.9 DWR again refuses to respond or to comply with the Deposition Subpoena. DWR filed
24 yet another Protective Order Motion with the SWRCB on March 10, 2017 in advance of the deposition
25 scheduled for March 20, 2017. The response by the Exchange Contractors to the requested
26 Protective Order was filed March 14, 2017. (Exhibit “9”.) The SWRCB has never ruled upon DWR’s
27 requested Protective Order but the Deposition scheduled for March 20, 2017 was suspended by the
28 obstruction of DWR. Because DWR unilaterally announced that it and its witnesses would not attend,
29 the Exchange Contractors postponed the depositions because it seemed impolite not to notify
30 all other parties that no witness would appear at that date and time.

31
32 3.10 SWRCB asks DWR and CVP to be specific. The SWRCB’s Part 2 scheduling memo
33 issued August 31, 2017 evidences that the SWRCB ordered the DWR and CVP as follows:

34
35 “To eliminate any confusion concerning petitioner’s current proposal, we direct
36 the petitioners to provide an updated summary of operating criteria that makes
37 explicit whether particular criteria are proposed conditions of operations, or are
38 set forth solely as modeling assumptions. This summary shall be submitted by
39 petitioners by September 8, 2017.”

40
41 The CVP and SWP did not state by September 8, 2017 whether the “dual path” delivery of 3,000 cfs
42 July through September is to be assured through SWP and CVP funding of emergency repair and
43 maintenance of levees or to be discontinued when the expense reaches certain levels.

1 **Discussion**

2
3 **The SWRCB needs to be clear that Part 2 will include this evidence. The SWRCB should**
4 **recognize that DWR can be its own worst enemy in advocating this Project.**

5
6 Economic pledging of financial and physical resources for Tunnels through the Delta means that
7 when levees fail in the future, salt water will intrude and organic carbon will be pumped by tides from
8 breached islands through the DWR and CVP pumps, making water unusable for domestic purposes
9 under certain conditions. The “dual path” will be prevented from operating during substantial periods
10 because funding for levee maintenance and repair work is unavailable unless mandated as a
11 condition of the Tunnel Project. Alternatively, the SWP will wish to utilize the tunnels on a full-time
12 basis during droughts to conserve water. Evidence of what is likely or possible if the “dual path” is not
13 a joint financial obligation of the CVP and SWP needs to be considered and specific conditions for
14 levee maintenance, repairs, and possibly abandonment of the “dual path” considered. Such an
15 examination may lead to a conclusion that reasonable and beneficial use of water requires additional
16 Project conditions or alternative facilities.

17
18 Dedication to the existence of the Tunnels of \$17 billion Dollars of debt payments and annual
19 operation and maintenance expense has effects upon the public trust, use of public resources and
20 public interest because it makes it impossible or impractical to prevent through maintenance and
21 repair and funding the rapid repair of the levee system upon breaches occurring.

22
23 The evidence SJRECWA and others propose to introduce would allow conditions to be established
24 which clearly explain what work the SWP and CVP would be required to do if levee failures occur
25 regarding “dual path” levee repairs and emergency repairs in these predicted and likely
26 circumstances. Perhaps the SWRCB would conclude the “dual path” is not practical or sustainable. If
27 so, perhaps the Tunnels are a politician’s favored solution, but perhaps other physical solutions are
28 more reasonable and beneficial. [NOTE: Quotations end here.]

29
30 Respectfully Submitted,

31
32
33 Patrick Porgans, Solutionist
34 Patrick Porgans/Associates

35
36
37 **NOTE:** To avoid duplication of the Hearing record, P/A did not include the SJRECWA Exhibits.